SUPERIOR COURT
OF THE
STATE OF DELAWARE

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August 8, 2023

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Re: *BDO USA, LLP v. JSCo Enterprises, Inc. (f/k/a EverGlade Global, Inc.)*, C.A. No. N22C-12-063 KSM CCLD

Dear Counsel:

This letter addresses the parties' dispute over outstanding issues following my entry of default judgment against EverGlade Global, Inc.[2] The outstanding issues are: (i) whether I should empanel a jury to resolve the damages BDO may receive; (ii) whether BDO may pursue a claim for punitive damages now that this matter has been transferred to the Superior Court; (iii) whether BDO is entitled to treble damages and fee-shifting under the Deceptive Trade Practices Act, 6 *Del. C.* § 2532 et seq.; (iv) whether, after

[1] Sitting as a Judge of the Superior Court of the State of Delaware by special designation of the Chief Justice of the Supreme Court of Delaware pursuant to Del. Const. art. IV, § 13(2).

[2] *See* C.A. No. N22C-12-063 KSM CCLD, Docket ("Dkt.") 13 (BDO's February 14, 2023 letter addressing outstanding issues). I refer to EverGlade by its old name rather than "JSCo Enterprises, Inc." for consistency and convenience. *See* Dkt. 32 (stipulation to amend caption). Docket entries refer to C.A. No. N22C-12-063 KSM CCLD unless otherwise specified.

resolving the damages issue, this matter should be transferred back to the Court of Chancery so that BDO may pursue permanent injunctive relief; (v) whether the testimony of BDO's damages expert, Dr. Maureen Chakraborty, should be excluded as unreliable; and (vi) whether BDO's requested fee amount is reasonable.

In this letter, I resolve the first two issues only—the damages jury issue and BDO's punitive damages remedy.[3] I assume the reader's familiarity with this action and refer to the factual background set out in my January 31, 2023 Memorandum Opinion.[4]

EverGlade argues that it is entitled to a jury trial on damages, invoking Superior Court Rules and the Delaware Constitution as independent sources of a right to a jury trial.[5] BDO does not contest the validity of EverGlade's jury demand. Instead, BDO argues that neither the Superior Court Rules nor the Delaware Constitution provide a jury trial right to EverGlade, that this court has discretion to convene a jury on damages following a default judgment, and that I should exercise that discretion in favor of convening a jury in this action.[6]

[3] I addressed the fee issue in a separate letter decision.

[4] *See BDO USA, LLP v. EverGlade Glob., Inc.*, 2023 WL 1371097 (Del. Super. Jan. 31, 2023). Undefined terms in this letter decision have the same meaning ascribed to them in the Memorandum Opinion.

[5] Dkt. 25 ("EverGlade's Opening Br.") at 3–4 (citing Super. Ct. Civ. R. 38).

[6] Dkt. 27 ("BDO's Answering Br.") at 5.

For its Rules-based argument, EverGlade places special emphasis on Superior Court Rule 38's notice-and-demand procedures.[7] EverGlade points to subsections (b) and (e), which respectively provide that "[a]ny party may demand a trial by jury of an issue triable of right by a jury" and that withdrawing a jury demand requires consent of the parties.[8] EverGlade reads these provisions to mean that, so long as a party obeys these steps, it is entitled to a jury, regardless of whether the court later enters default judgment against it.

EverGlade's expansive construction of Rule 38 is inconsistent with another Superior Court Rule. Rule 55(b)(2) provides:

> If, in order to enable the Court to enter [default] judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, *the Court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute*.[9]

By stating that the court shall "accord a right of trial by jury . . . when and as required by any statute[,]" Rule 55 implies that, absent other positive law, a party does not have a

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[7] *See generally* Super. Ct. Civ. R. 38. Rule 38(a) also provides that "[t]he right to trial by jury shall be as heretofore." This language mirrors Article I, Section 4 of the Delaware Constitution, which creates civil jury trial rights. *See* Del. Const. art. I, § 4. EverGlade does not invoke Rule 38(a). Accordingly, and because Rule 38(a) seems merely to restate the scope of a party's constitutional right to a civil jury, this decision does not address that provision.

[8] *See* Super. Ct. Civ. R. 38(b), (e).

[9] Super. Ct. Civ. R. 55(b)(2) (emphasis added).

right to a jury on damages following a default judgment.[10] Consistent with this interpretation, the Superior Court does not typically convene one. Rather, the trial court judge typically determines the amount of damages at an inquisition hearing "based on a preponderance of the evidence."[11] Rule 55 therefore tacitly acknowledges that persons might not be entitled to a jury following a default judgment, even if it does not address Rule 38's notice-and-demand process directly.[12]

This reading of Rule 55 aligns with the procedural scheme of other Delaware courts. For instance, a Delaware statute affords Justice of the Peace courts the flexibility to assess damages after a defendant defaults by failing to appear.[13] Under those circumstances, the statute empowers the Justice of the Peace to "conduct such hearings or order such references as it deems necessary and proper" to "establish the truth of any averment by

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[10] *See id.*

[11] *See Jagger v. Schiavello*, 93 A.3d 656, 659 (Del. Super. 2014); *Patton v. Yancey*, 2014 WL 4674600, at *2 (Del. Super. Sept. 22, 2014) (analyzing the parallel rule for the Court of Common Pleas and noting that "[t]ypically after a default judgment is ordered, an inquisition hearing is held to determine damages.").

[12] Federal case law reaches a similar result when interpreting Federal Rule of Civil Procedure 55(b)(2). *See, e.g.*, *KD v. Douglas Cty. Sch. Dist. No. 001*, 1 F.4th 591, 601 (8th Cir. 2021) ("[Federal] Rule 55(b)(2) entrusts the district court with the discretion to decide if a hearing on the issue of damages is necessary following default judgment, and nothing in Rule 55(b)(2) mandates that a jury determine the amount of damages, should the district court elect to hold a hearing."). This precedent is insightful because Federal Rule 55(b)(2)'s default judgment language parallels Delaware Superior Court Rule 55(b)(2). *Compare* Super. Ct. Civ. R. 55(b)(2), *with* Fed. R. Civ. P. 55(b)(2).

[13] 10 *Del. C.* § 9537.

evidence or to make an investigation of any [damages-related] matter[.]"[14] The use of parallel, statutory language emphasizing flexibility further undermines EverGlade's interpretation of Rule 38.

Because EverGlade's Rules-based argument fails, the analysis turns to whether EverGlade has a right to a jury trial on damages after entry of default judgment under the Delaware Constitution.[15] EverGlade argues that resolving the damages issue requires this court to make findings of fact, which is the traditional domain of juries in civil actions at law.[16] From this premise, EverGlade argues that Rule 55 is unconstitutional to the extent it forecloses a jury trial under these circumstances.

The right to a jury under Delaware law is enshrined in Article I, Section 4 of the Delaware Constitution, which provides that "[t]rial by jury shall be as heretofore."[17] This provision is not self-explanatory. It has been interpreted to preserve "all of the fundamental

[14] 10 *Del. C.* §§ 9537(a), (a)(2).

[15] *See McCool v. Gehret*, 657 A.2d 269 (Del. 1995) ("[T]he right to a jury trial in civil proceedings has always been and remains exclusively protected by provisions in the Delaware Constitution.").

[16] *See* EverGlade's Opening Br. at 5–7. EverGlade plans to argue before a jury that, default judgment notwithstanding, there are no damages to BDO.

[17] *See* Del. Const. art. I, § 4.

features of the jury system as they existed at common law."[18] On the other hand, "there is no constitutional right to a trial by jury in actions that are historically equitable in nature."[19]

The parties cite to no Delaware case resolving whether, under common law principles, a party is entitled to demand a jury trial on the issue of damages after entry of a default judgment. To be sure, there is plenty of Superior Court case law deciding damages issues without a jury after entering default judgment. Where the claim at issue is for a "sum certain" and where the default judgment is entered for failure to appear, for instance, the Superior Court regularly upholds damages amounts rendered by the Prothonotary in accordance with Superior Court Rule 55(b)(1).[20] Otherwise, the Superior Court's standard

[18] *McCool*, 657 A.2d at 282. The court there observed that the "as heretofore" jury trial right in Delaware's current constitution was preserved from prior constitutions going back to the First Founding. *See id.* at 281–283; *see also Storey v. Camper*, 401 A.2d 458, 463 n.4 (Del. 1979); *Money Store/Delaware, Inc. v. Kamara*, 704 A.2d 282, 283 (Del. Super. 1997) (stating that Article I, § 4 "has been interpreted to guarantee a right of trial by jury as it existed at common law").

[19] *Kamara*, 704 A.2d at 283.

[20] *See, e.g.*, *Langston v. Exterior Pro Sols., Inc.*, 2020 WL 6158114, at *5 (Del. Super. Oct. 21, 2020) (denying a motion to vacate a default judgment and upholding the Prothonotary's entry of damages of $19,506.31, which reflected a sum certain); *JumpCrew, LLC v. Bizconnect, Inc.*, 2022 WL 2828174, at *1 (Del. Super. July 5, 2022) (denying a motion to vacate a default judgment after the defendant failed to timely appear and where the Prothonotary had entered damages of $753,959.44); *see also* Superior Court Rule 55(b)(1) ("When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the Prothonotary upon written direction of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has failed to appear in accordance with these Rules[.]").

practice is to either hold an inquisition hearing on the damages[21] or to delegate a hearing to an independent commissioner.[22] Other times, the Superior Court has simply assessed damages directly.[23]

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[21] *See Meyer v. Am. Reliance Ins. Co.*, 1991 WL 89820, at *3 (Del. Super. Apr. 26, 1991) (ordering an "inquisition at bar" to determine damages after entering a default judgment); *O'Rourke v. PNC Bank*, 2021 WL 1100580, at *1 (Del. Super. Mar. 22, 2021) (entering default judgment and ordering an "inquisition hearing to determine the amount of damages owed"); *Capitol Cleaners & Launderers Inc. v. Twining Rest. Assoc. Inc.*, 2018 WL 1005309, at *1 (Del. Super. Feb. 20, 2018) (refusing to vacate a default judgment as to liability but ordering an "inquisition on the amount of damages"); *Jagger*, 93 A.3d at 659–660 (stating that, in inquisition hearings following default judgment, "the sole focus . . . is the amount of damages owed to the plaintiff, which is determined by the trial court judge" but noting that at such hearings, "the Court may investigate other matters that arise at the inquisition hearings besides damages"); *W & G Wilford Assocs., L.P. v. Jeffcor, Inc.*, 1991 WL 113353 (Del. Super. Apr. 12, 1991) (awarding $94,691, and $96,510 against respective defaulted defendants in a post-inquisition hearing decision after entry of default judgment); *Williams v. Cty. Bus Serv., Inc.*, 1990 WL 1242521 (Del. Super. Apr. 30, 1999) (same); *Shah v. Bavi Motel, LLC*, 2011 WL 6145125 (Del. Super. Dec. 5, 2011) (entering default judgment for the defendant's failure to appear and scheduling an inquisition hearing on damages); *Thompson v. Colonial Ct. Apartments, LLC*, 2006 WL 3174767, at *1 (Del. Super. Nov. 1, 2006) (denying motion to vacate a default judgment award of $35,000 that the court had determined at an inquisition hearing); *Cabrera v. Hurtado*, 2008 WL 3413330 (Del. Super. May 20, 2008) (awarding $37,856.67 in post-default judgment damages after an inquisition hearing and supplemental briefing); *Word v. Balakrishnan*, 2004 WL 780134, at *1 (Del. Super. Apr. 13, 2004) (denying the defendants' motion to set aside a default judgment after the court awarded $325,000 in damages following an inquisition hearing); *Ascione v. DeFague*, 1995 WL 562161, at *5 (Del. Super. Aug. 23, 1995) (vacating a default judgment as to damages and scheduling an inquisition hearing); *Fin. & Brokerage Servs., Inc. v. Robinson Ins. Assocs., Inc.*, 1990 WL 199503, at *5 (Del. Super. Nov. 21, 1990) (scheduling an "inquisition at the Bar" at which the defaulted defendants could "respond to evidence of damages"); *see also Apartments Cmties. Corp. v. Martinelli*, 859 A.2d 67 (Del. 2004) (upholding the Superior Court's default judgment, which included a damages award of $16,990.87 following an inquisition hearing).

[22] *See, e.g.*, *Kece v. Wojciechowski*, 2014 WL 890622 (Del. Super. Mar. 6, 2014) (adopting a report and recommendation of the Court Commissioner following an inquisition hearing on damages after entry of default judgment); *Randolph v. Alphonso's II Split Ends*, 2007

From my review, however, this case law effectively treats the jury issue as waived or otherwise irrelevant. It does not appear that the defendants demanded a jury on damages in any of these actions. Nor do the cases engage with the constitutional implications of resolving the damages issue without one. In at least one instance, however, the Superior Court has ordered a jury trial on the issue of damages after entering default judgment under

WL 625370, at *1 (Del. Super. Feb. 26, 2007) (denying a motion to vacate a default judgment and scheduling an inquisition hearing before an independent commissioner); *Schweizer v. Hoffman*, 2014 WL 904304, at *1 (Del. Super. Mar. 6, 2014) (adopting an independent commissioner's assessment of damages after entering a default judgment against the defendant); *Mahoney v. Avantix Lab'ies, Inc.*, 2007 WL 789440, at *1 (Del. Super. Mar. 13, 2007) (denying a motion to vacate a default judgment after having a commissioner conduct an inquisition hearing on the amount of damages); *Campbell v. Robinson*, 2007 WL 1765558, at *3 (Del. Super. June 19, 2007) (adopting a commissioner's report and recommendation for a $40,000 default judgment as to damages but modifying the apportionment of damages).

[23] *See, e.g.*, *Diamond Fortress Techs., Inc. v. EverID, Inc.*, 274 A.3d 287, 296, 306–309 (Del. Super. 2022) (awarding damages in a written opinion after the defendant had defaulted, based on a supplemental record generated through the parties' briefing); *Lambert v. Novak Druce Connolly Bove and Quigg LLP*, 2017 WL 4269882, at *5–6 (Del. Super. Sept. 25, 2017) (awarding plaintiffs $20,920.46 and $15,398.10 in damages in a decision entering default judgment against the defendant); *Del-One Fed. Credit Union v. Sokolove*, 2019 WL 6711443, at *4 (Del. Super. Dec. 9, 2019) (entering default judgment for $23,581.45 plus pre- and post-judgment interest because the amount was for a sum certain and the defendant had failed to appear); *Williams v. Brunner*, 2012 WL 1409514 (Del. Super. Jan. 9, 2012) (denying a motion to vacate a default judgment against the plaintiff/counterclaim defendant for $9,379.30 on the defendant/counterclaim plaintiff's counterclaim "without a hearing"); *IndyMac Bank, F.S.B. v. Dye*, 2008 WL 4394667, at *2 (Del. Super. Apr. 18, 2008) (entering default judgment for failure to answer the complaint or respond to the plaintiff's request for admissions and other discovery requests and judicially ordering mortgage-specific damages).

Rule 55(b)(2), but it did not set forth its reasoning.[24] One way or the other, it seems the issue has not been decided.

Mindful that Article I, Section 4 directly points to common law practice, I situate Delaware's practice within the broader history of American common law across the states, surveying both (i) the traditional common law approach to jury trials on damages; and (ii) the modern cases cited by the parties. With apologies, I note that I have summarized the historical practices in broad strokes for expediency; I am sure that another member of this court or a legal historian would or could paint a completer picture.

By the time of this country's First Founding,[25] there was "some confusion" within Anglo-American jurisprudence about when and whether a litigant was entitled to a jury trial on damages issues generally.[26] Following "ancient practice," courts had at least three processes for assessing damages after a default judgment by the defendant.[27]

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[24] *Tackett v. State Farm Fire and Cas.*, 1990 WL 140070, at *2 (Del. Super. Sept. 18, 1990) (ordering a trial by jury on damages issues after entering a default judgment pursuant to Rule 55(b)(2)).

[25] The term "Second Founding" has been used by at least some historians to describe the transformative role Reconstruction played after the Civil War. *See, e.g.*, Terry Gross, *'Second Founding' Examines How Reconstruction Remade The Constitution*, NPR (Sept. 17, 2019, 1:23 PM), https://www.npr.org/2019/09/17/761551835/second-founding-examines-how-reconstruction-remade-the-constitution. In keeping with this historical view, the court uses the term "First Founding" to refer to what is typically meant by "Founding."

[26] *Raymond v. Danbury & N. R. Co.*, 20 F. Cas. 332, 333 (D. Conn. 1877).

[27] *See* 1 Victor Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware* § 239, at 165 (1906).

The first was called an inquisition at bar, in which the court drew upon a twelve-man jury to assess damages after entering a default judgment.[28]

The second was called a writ of inquiry, which entailed getting the county sheriff to "summon[] a jury of twelve men of his own selection and tr[y] the question of damages."[29] According to later synopses, the jury would serve as "a mere instrument to inform the conscience of the court."[30] So, a jury convened through a writ of inquiry was an advisory body, rather than a typical fact-finding jury.[31]

The third option was to simply "tax the damages, if they will"—that is, decide the quantum of damages without outside support.[32] According to early U.S. Supreme Court precedent, this option was especially useful for resolving "interest for damages upon a single bill, or bills of exchange, etc. and there needs no writ of enquiry."[33] Relatedly, in cases involving promissory notes, the court would simply refer the damages inquiry to the

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[28] *Id.*

[29] *Id.*

[30] *Dean v. Willamette Bridge Ry. Co.*, 22 Or. 167, 171 (Or. 1892).

[31] *See, e.g.*, *Brown v. Van Bramm*, 3 U.S. 344 (1797) (stating that, under English common law, "[w]here judgment is by default, the court may give the damages, without putting the party to the trouble of a writ of enquiry. . . . The court may not only assess damages originally, but increase the damages previously assessed by a jury."). The *Van Bramm* court drew upon English common law to ascertain Rhode Island law because "the English authorities countenance the Rhode Island law and practice" at issue in the case before the court. *See id.*

[32] *Raymond*, 20 F. Cas. at 333 (internal quotation marks omitted).

[33] *Van Bramm*, 3 U.S. at 355.

Prothonotary to calculate interest.[34] In other words, courts typically retained discretion to do their own damages calculation or to outsource the math to the Prothonotary, which makes the most sense when damages are easily ascertainable. A reader can see the sketches of the modern practice here, where rules like Delaware Rule 55(b)(1) allow the Prothonotary to calculate sums certain where applicable after a default judgment.

Where damages were not readily ascertainable, however, the common law does not seem to prescribe clear rules on when to choose a writ of inquiry versus an inquiry at bar. States varied in their practices, and some solved the issue with legislation.[35] Rhode Island, for instance, had a statute giving maximum discretion to the judge, stating that "in all cases where judgment shall pass by default, etc. where damages are to be enquired and assessed, it shall be done by the court, or otherwise, at their discretion."[36] Other states, however, required writs of inquiry to be "executed on every occasion."[37]

Since long before the First Founding, Delaware too has used legislation for a middle ground. Around 1727, the Delaware Colonial Assembly enacted an "Act for the establishing courts of law and equity[.]"[38] In pertinent part, it provided that, for any

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[34] *See id.*; *Raymond*, 20 F. Cas. at 333.

[35] *Van Bramm*, 3 U.S. at 354. At the time of Founding, some states required writs of inquiry were "executed on every occasion[,]" whereas others (such as Rhode Island and Massachusetts) left it to the court's discretion.

[36] *See id.* (internal quotation marks omitted).

[37] *Id.*

[38] 1 Del. Laws ch. 54, §§ 1–28, *available at* https://archives.delaware.gov/ebooks-pdf/laws-of-delaware/ (collection of Delaware laws authorized by the Delaware general

"interlocutory judgment" entered by the Court of Common Pleas "at the motion of the plaintiff or his attorney[,]" the court would "make an order in the nature of a writ of enquiry" and have a jury "enquire of the amount of damages and costs sustained by the plaintiff in such action[,]" after which "the court may proceed to judgment, as upon inquisitions of that kind returned by the Sheriffs."[39] The phrase "interlocutory judgments" includes default judgments, though it appears that term was not yet in vogue. Delaware preserved this statute through the 19th century with minor changes.[40]

Another Delaware statute from the mid-18th century governing the Court of Common Pleas invoked the writ of inquiry when a defendant failed to appear. In such

assembly). Some analysts have noted "some uncertainty" about the date of this statute, but 1726 or 1727 seems to be when it was enacted. *See* William T. Quillen, Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 Del. J. Corp. L. 819, 824, 824 n.15 (1993).

[39] 1 Del. Laws ch. 54, § 19 (Providing, that "to prevent the excessive charges that have sometimes arisen upon executing writs of enquiry for damages, Be it enacted, That the justices who give any interlocutory judgment, shall (at the motion of the plaintiff or his Attorney in the action where the judgment is given) make an order in the nature of a writ of enquiry, to Charge the jury attending at the same or next court after such judgment is given, to enquire of the damages and costs sustained by the plaintiff in such action, which enquiry, shall be made and evidence given in open court, and after the inquest have considered thereof, they final forthwith return their inquisition under their hands and seals, whereupon the court may proceed to judgment, as upon inquisitions of that kind returned by the Sheriffs.").

[40] *Compare id.*, *with* 14 *Del. C. 1852*, ch. 92, § 4. Delaware substantially preserved this statute with minor amendments until the 1950s. *See* revision note to 10 *Del. C. 1953*, § 563 (stating that the statute was revised to be consistent with "Rules 38 and 55 of the Superior Court").

circumstances, the defendant would receive notice and an opportunity to show "good cause," after which the court could award "a Writ of Enquiry, if the case may require it."[41]

Delaware continued to emphasize the writ of inquiry through the 19th century. Statutes passed in that period explicitly recognized it for assessing post-default damages in special contexts, such as landlord-tenant actions.[42] In cases during this period, however, the court seems to have deployed the writ of inquiry at the request of the plaintiff, not the defendant.[43] This suggests that the writ of inquiry was not considered a mechanism by which defendants would demand a jury.

National practice during the 19th century, however, diverged among states on the damages jury issue. Several courts came to the view that a defendant had no right to a

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[41] 1 Del. Laws ch. 130, § 2. This statute appears to have been passed during a term of Royal Governor James Hamilton, either between October 1748 through 1754 or 1759 through 1763. The year is not immediately apparent.

[42] *See, e.g.*, 7 Del. Laws ch. 37, § 2 (1827 statute enabling the writ of inquiry process for default judgments concerning "public recognisances and bonds"); 7 Del. Laws ch. 169, § 7 (1829 statute on landlord-tenant actions allowing damages for "rent in arrear" to be found "either by a jury drawn and sworn or affirmed . . . as in cases of jury trials[,]" "by a jury of inquiry, upon a writ of inquiry awarded for that purpose, or otherwise, as the court may in their discretion order").

[43] *See, e.g.*, *Newbold v. Wilkins*, 1 Harr. 43 (Del. Super. Apr. 1, 1832); *State, for Use of Bail v. McCullough*, 1798 WL 192, at *1 (Del. Ct. C.P. Dec. 20, 1798) (stating that the court ordered an "order to charge the jury to make inquiry" upon the plaintiff's motion); *Lofland v. Dunovan*, 3 Harr. 509, 510 (Del. Super. Ct. 1842) (stating that the court ordered an "inquisition of damages by a jury" according with the plaintiff's motion); *see also Macklin v. Ruth*, 4 Harr. 87 (Del. Super. Oct. 1, 1843) (stating "an order was made in the nature of a writ of inquiry to charge the jury . . . to inquire of the damages, &c." but not stating which party asked for it); *Citizens' Loan Ass'n v. Martin*, 40 A. 1108, 1109 (Del. Super. 1894) (stating that the court used a writ of inquiry, but not stating which party made the motion).

damages jury and left it to the judge's discretion. For instance, in 1892, the Oregon Supreme Court decided *Dean v. Willamette Bridge Railway Company*.[44] There, a passenger had been hurt riding the defendant railroad company's train, brought a tort action, and the trial court entered a default judgment after the defendant failed to appear.[45] Although an Oregon statute held that the court shall assess damages "without the intervention of a jury[,]" the trial court had "refused to hear the testimony and assess the damages" without one, reasoning that a jury was required under the Oregon constitution.[46]

On appeal, the high court of Oregon reversed, holding the statute constitutional and stating that the damages jury issue was left for the court's discretion.[47] The high court reasoned that damages are the "pecuniary consequence[] which the law imposes for the breach of some duty, or the violation of some right."[48] By contrast, the court reasoned that juries are designed to assess issues relating to liability. So, when the facts "are admitted there is no issue to be tried by a jury; the plaintiff's right to damages stands confessed."[49] The high court remanded the case to the trial court for further proceedings, effectively asking it to revisit the jury question as a discretionary matter instead of a mandatory one.[50]

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[44] *Dean v. Willamette Bridge Ry. Co.*, 29 P. 440 (Or. 1892).

[45] *See generally id.*

[46] *See id.* at 440–441.

[47] *Id.*

[48] *Id.* at 442.

[49] *Id.*

[50] *Id.* at 443.

In 1877, the U.S. District Court for the District of Connecticut reached a similar conclusion in *Raymond v. Danbury & N.R. Co.*[51] That decision did not dwell on its facts, stating simply that a defendant in a negligence action had "suffered a default, and have thereby admitted a cause of action, as alleged[.]"[52] In deciding whether the Seventh Amendment required a jury on the damages issue, the court canvassed Anglo-American common law practice. It observed that "the subject of the ascertainment of damages [had been] in some confusion" and stated that in tort actions, the "assessment of damages by a jury" was "a matter of practice, and not of right" at English common law.[53] The court noted that the "practice of the United States courts, in the different circuits, has not been uniform[,]" and that "the practice has conformed to the usages of the state in which the circuit court was held."[54] The court thus left the assessment of damages to itself "or, if the

[51] *Raymond,* 20 F. Cas. at 334 (stating that the "practice of the United States courts, in the different circuits, has not been uniform" but concluded that "practice has conformed to the usages of the state in which the circuit court was held" and that in Connecticut, "the assessment of damages by a jury, upon a default, is matter of practice, and not of right"); *see also Haines v. Comfort Keepers, Inc.*, 393 P.3d 422, 432 (Alaska 2017); *Randolph v. Foster,* 4 Abb. Pr. 262, 262 (N.Y. Com. Pl. 1857) (stating that a default judgment provides "no occasion for a trial" and that plaintiff's damages should be assessed through a "writ of inquiry" by the sheriff's office).

[52] *Raymond,* 20 F. Cas. at 333. Presumably the federal court had diversity jurisdiction over the case.

[53] *Id.*

[54] *Id.* at 334.

parties agree, by the clerk, as committee, to find and report the facts and the amount of damages."[55]

Other jurisdictions went a different way. For example, the Supreme Courts of Texas, Missouri, and West Virginia recognized a right to a jury trial on damages based largely on the practice in those jurisdictions.[56]

Probably because Delaware addressed the issue through legislation, it appears that 19th century Delaware courts did not need to grapple with the right-versus-practice debate in which sister states' courts had engaged. Delaware's first Constitution (of 1776) did not mention a jury trial right, and its subsequent constitutions simply preserved the right to a trial by jury "as heretofore."[57] The 1897 Constitution, still in effect, uses the same

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[55] *Id.*

[56] *Central & M.R. Co. v. Morris*, 3 S.W. 457, 462 (Tex. 1887) ("We are of the opinion, however, that, under the course of procedure at common law, when a judgment was rendered by default, and the cause of action was not liquidated, a jury was always called to assess the damages. If this be so, the right is preserved by the fifteenth section of our bill of rights, and cannot be infringed by any act of the legislature."); *Swearingen v. Knox*, 1846 WL 3969 (Mo. Mar. 1, 1846) (stating that where a party is in default for failure to appear, the other "cannot . . . dispense with a jury, and submit the trial of the issues to the court. . . . [T]he defendants not appearing, the [lower] court had no right to assume that they did not require a jury, and under such circumstances the damages could only have been assessed by a jury."); *Haines*, 393 P.3d at 432 (collecting cases for this proposition and quoting *Hickman v. Baltimore & Ohio R. Co.*, 4 S.E. 654, 659 (W. Va. 1887), *overruled in part on other grounds by Richmond v. Henderson*, 37 S.E. 653, 660 (W. Va. 1900) (concluding that common law practice foreclosed a "final judgment by default" in disputes over more than $20 that are not a sum certain, and holding that "the right of either party, if he demands it, to have such writ executed by a jury, is [guaranteed] by our constitution" (cleaned up))).

[57] *See* Del. Const. of 1776, art. 25 (not creating a jury trial right, but implicitly endorsing a common law jury trial right by stating that the "common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall

language. So, although Delaware has constitutionalized the common law right to a jury since the First Founding, my research does not resolve whether that common law right included a damages jury. The most likely explanation for the lack of authority on point is that the statutory writ of inquiry process preceded the time of constitutional debates and made discussion on this topic less urgent as a practical matter.[58]

To the extent the court looks to Delaware's pre-1897 past for a common law rule, it is hard to know what to extrapolate. One might infer that Delaware codified the writ of inquiry for almost two centuries because the damages jury was an integral component of this state's tradition. On the other hand, one might view the writ of inquiry as a workaround to a common law damages jury right. As discussed above, judges used writs of inquiry to convene juries to be advisory bodies—not necessarily factfinders. And the sheriff, rather than the judge, could convene the jury, further distinguishing it from traditional fact-finders. So, one might read Delaware's history to implicitly endorse *Raymond* and *Dean* in treating the damages jury as a best practice—not a right of the defendant. This view has more support from sources emphasizing the discretionary elements of the writ of inquiry process.

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remain in force"); Del. Const. of 1792, § 4 ("Trial by jury shall be as heretofore"); Del. Const. of 1831, § 4 (same).

[58] From my research, I am not aware of any cases engaging with the constitutionality of Delaware's historic writ of inquiry practice. Again, the same caveats apply—this research was done largely independent of briefing by a small team with a lot on its plate including one beleaguered clerk. Historians might wish to dig longer and deeper.

In sum, it does not seem there was a clear answer to the damages jury issue in Delaware by the 1896–97 Constitutional Convention. Against this (admittedly roughly drawn) backdrop, it seems safe to conclude that there is no common law rule foreclosing what has become the routine practice in the Delaware Superior Court—to assess damages using a hearing or other means after a default judgment, rather than convening a jury every time.

To avoid this outcome, EverGlade first draws on federal case law.[59] But according to federal case law, "[d]efendants do not have a constitutional right to a jury trial following entry of default."[60] Federal courts typically reason that the Seventh Amendment extends only to the merits, but a party forfeits their right to a decision on the merits after default is entered against them.[61] A defendant in default "waive[s]" his right to a jury "when he purposefully [chooses] not to answer the suit and timely request such a trial."[62]

EverGlade identifies two outlier decisions in support of its argument, but neither deserves much weight. The first is *Zero Down Supply Chain Solutions, Inc. v. Global Transportation Solutions, Inc.*, where the District Court of Utah held that "nothing in the

[59] These cases interpret jury trial rights under the Seventh Amendment. U.S. Const. amend. VII. The Seventh Amendment is not binding on the States. *See generally Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916); *McDonald v. City of Chi.*, 561 U.S. 742, 784, n.30 (2010) (stating that the Seventh Amendment's civil jury requirement does not apply to the states).

[60] *Olcott v. Del. Flood Co.*, 327 F.3d 1115, 1124 (10th Cir. 2003).

[61] *See Olcott*, 327 F.3d at 1124.

[62] *Dierschke*, 975 F.2d at 185.

language of [Federal Rule 55] implies that the non-consenting party loses its right to a jury trial simply because it is in default."[63] But *Zero Down* appears to contradict the Court of Appeals for the Tenth Circuit's decision in *Olcott*.[64]

The second case is *Hutton v. Fisher*, where the Court of Appeals for the Third Circuit determined that a valid jury demand "should in fairness and logic be applied" in cases involving default judgments, citing a defaulted party's "vital interest in the subsequent determination of damages[.]"[65] But after that decision was handed down in 1966, subsequent federal courts both inside and outside the Third Circuit have moved in the opposite direction.[66]

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[63] *See Zero Down Supply Chain Sols., Inc. v. Global Transp. Sols., Inc.*, 282 F.R.D. 604, 606 (D. Utah 2012).

[64] *See* 327 F.3d at 1124.

[65] 359 F.2d 913, 916 (3d Cir. 1966).

[66] *See, e.g.*, *Kormes v. Weis, Voisin & Co., Inc.*, 61 F.R.D. 608, 609 (E.D. Pa. 1974) ("Although there is no decision of the United States Supreme Court on the question, it is generally agreed that neither party has a constitutional right to a jury trial on the issue of damages after entry of default." (citations omitted)); *Graham v. Malone Freight Lines, Inc.*, 314 F.3d 7, 16 (1st Cir. 1999) ("Neither the Seventh Amendment nor the Federal Rules of Civil Procedure require a jury trial to assess damages after entry of default in these circumstances."); *Matter of Dierschke*, 975 F.2d 181, 185 (5th Cir. 1992) ("It is . . . clear that in a default case neither the plaintiff nor the defendant has a constitutional right to a jury trial on the issue of damages.") (cleaned up); *Mwani v. Bin Ladin*, 244 F.R.D. 20 (D.D.C. 2007) ("[T]he question of whether a jury or bench trial should be held on the issue of damages [following a default judgment] is a discretionary determination to be made by the Court."); *Henry v. Sneiders*, 490 F.2d 315, 318 (9th Cir. 1974) ("Rule [55] does not itself require a jury trial on the issue of damages. Nor does the appellant have a constitutional right to a jury trial under these circumstances, since the Seventh Amendment right to trial by jury does not survive a default judgment."); *Countryman Nev., LLC v. Suarez*, 2016 WL 5329597, at *4 (D. Or. Sept. 22, 2016) (observing that there is

EverGlade also cites two state Supreme Court cases from other jurisdictions.[67] In the first, *Green v. Snellings*, the Georgia Supreme Court held that a defendant in default was entitled to notice of a hearing on damages and "upon demand, a jury trial on that

"substantial case law holding that there is no right to a jury trial for damages after entry of default"); *Benz v. Skiba, Skiba & Glomski*, 164 F.R.D. 115, 116 (D. Me. 1995) (stating that "[c]aselaw dating back to the eighteenth century . . . makes clear that the constitutional right to jury trial does not survive the entry of default" and ordering an evidentiary hearing on post-default damages instead); *Olcott*, 327 F.3d at 1124; *KD*, 1 F.4th at 601.

[67] EverGlade also seeks support from a range of other cases that are not directly relevant. EverGlade cites *Gebelein v. Four State Builders*, which states that default does not cause a defendant to automatically admit damages-related allegations in the complaint. That is not at issue. EverGlade's Opening Br. at 6 (citing 1983 WL 20294, at *3 (Del. Ch. Feb. 24, 1983)). EverGlade also cites several cases holding that a plaintiff may not rescind a jury demand after a default judgment is entered against the defendant because doing so is prejudicial to the defaulting defendant. EverGlade's Opening Br. at 4–5 (citing *Zaiter v. Riverfront Complex, Ltd.*, 493 Mich. 544, 556 (Mich. 2001); *Mitchell v. Bd. of Cnty. Comm'rs of Cnty. of Santa Fe*, 2007 WL 2219420, at *14 (D.N.M. May 9, 2007)). These cases are not applicable where, as here, the party in default has asserted a jury demand against the non-defaulting party. And EverGlade also cites to several Delaware cases that address jury issues or defamation but that do not involve default judgments. EverGlade's Opening Br. at 5–7 (citing *Pennington v. Scioli*, 2011 WL 3568266, at *5 (Del. Super. Feb. 16, 2011); *Ramada Inns, Inc. v. Down Jones & Co., Inc.*, 543 A.2d 313, 330 (Del. Super. 1987); *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 698 (Del. Super. 1989); *Gannett Co., Inc. v. Kanaga*, 750 A.2 1174, 1190 (Del. 2000); *Alexander v. Town of Cheswold*, 2007 WL 1849089, at *4 (Del. Super. June 27, 2007)). Those cases are not directly on point because the critical variable here is the entry of default judgment.

issue."[68] But Georgia had a statute conferring jury rights to damages to parties in default.[69] No comparable, modern Delaware statute exists.[70]

The second is *Holm v. Wells Fargo Home Mortgage, Inc.*, where the Missouri Supreme Court also held that the right to a jury survives entry of a default judgment.[71] There, the trial court had entered a sanction for discovery misconduct in a wrongful foreclosure action brought by homeowners against a mortgage lender. The trial court struck the mortgage lender's pleadings and prevented it from presenting evidence at trial, cross-examining witnesses, or objecting to the plaintiffs' evidence.[72] The sanctions facilitated an easy victory for the plaintiffs at trial, to whom the trial court awarded over $3 million in combined compensatory, emotional distress, and punitive damages.[73]

On appeal, the Missouri Supreme Court affirmed the sanctions and the finding of liability but reversed the damages award and remanded the damages for a jury's consideration. The high court held that

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[68] 260 Ga. 751, 752 (Ga. 1991).

[69] *See* Ga. Code Ann., § 9-11-55(a) (stating that "in the event a defendant, though in default, has placed damages in issue by filing a pleading raising such issue, either party shall be entitled, upon demand, to a jury trial of the issue as to damages."). The court in *Green* directly cited this statute in rendering its decision. *See* 260 Ga. at 752 n.1.

[70] 10 *Del. C.* § 563 allows a party "entitled to a judgment by default" to demand a jury trial, in which case "the action shall thereafter be designated upon the docket of the Superior Court as a jury action and proceeded with accordingly." That statute only seems to confer a jury trial right to the non-defaulted party, in this case, BDO.

[71] 514 S.W.3d 590 (Mo. 2017).

[72] *Id.* at 593.

[73] *See id.* at 595.

> the imposition of sanctions . . . does not strip a party of its right to have a jury determine the amount of damages. Even when a defendant defaults in a case or incurs sanctions striking its pleadings and preventing it from participating at trial, there must still be a hearing to prove the plaintiff's damages. Any defendant that has not waived its right to a jury trial can request a jury determine those damages.[74]

The high court emphasized that the Missouri Constitution describes trial by jury as "inviolate[,]" that it is guaranteed except when limited statutory criteria for waiver are met, and that "the mortgage companies were not required to affirmatively request a jury trial to preserve their constitutional right[.]"[75]

Holm does not warrant significant weight for several reasons. For one, it is contrary to other recent State Supreme Court decisions. For instance, in a thorough and scholarly analysis in *Haines v. Comfort Keepers, Inc.*, the Alaska Supreme Court determined that the Alaska Constitution did not entitle a defaulted party to a damages jury, as the contemporaneous common law at the time it was written had "coalesced behind" this approach.[76] The Alaska high court observed that "[c]ourts have disagreed on whether a jury demand survives the entry of default."[77] So state courts clearly differ in their approach.

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[74] *Id.* at 601.

[75] *Id.* at 600 (internal quotation marks omitted).

[76] 393 P.3d at 432.

[77] *See id.* at 431–433 (tracing the origin of the damages jury to the English common law). The high court nonetheless held that the non-defaulting party had preserved his right to a jury trial on damages in that case. *See id.* at 433–35. That issue is distinct from whether a *defaulted* party retains a right to demand a jury.

Although Delaware case law has not expressly grappled with the constitutional analysis, they implicitly endorse a path closer to Alaska's.

Furthermore, basic principles of fairness favor sticking with Delaware's existing practice of leaving the damages jury to judicial discretion. As discussed in the Memorandum Opinion, EverGlade earned its sanctions through opprobrious discovery conduct and related activity. EverGlade's refusal to play by the rules prejudiced the other side. It stands to reason that the court should be allowed to clean up damages-related fallout in the most efficient manner it sees fit, rather than burdening itself and the parties with the extensive work required to convene a jury trial.

In sum, I am not convinced that a damages jury is required as a constitutional matter. Here, it appears most efficient to resolve issues relating to compensatory damages (and/or treble damages, if any) at a follow-up hearing featuring expert testimony and motion practice.

That said, BDO's request for punitive damages complicates matters. As a matter of jurisdiction and power, a Superior Court judge may assess punitive damages directly.[78] Nonetheless, I worry that judicially imposing punitive damages in a defamation case stretches the judge's role (or, at least, this judge's role) too far. The Court of Chancery has

[78] *See Shore Invs., Inc. v. Bhole, Inc.*, 2011 WL 5967253, at *14 (Del. Super. Nov. 28, 2011) (awarding $25,000 in punitive damages in a breach of contract suit where the defendant's conduct was "similar in nature to that of a tort" and a "willful wrong, in the nature of deceit" (internal quotation marks omitted)).

elsewhere described the especially jury-centric nature of defamation generally.[79] Even in the exceptional circumstances before me, there is always a risk that I would ill-wittingly create dangerous precedent in an area outside of my expertise. As an exercise of my discretion, I decline to conduct a bench trial on BDO's request for punitive damages.

So, the ball is in BDO's court. If BDO chooses to drop its punitive damages claim, the parties shall contact my Chambers to schedule a time for a hearing date. Alternatively, if BDO chooses to pursue its punitive damages claim, the court will convene a jury. If the court convenes a jury, the jury will be asked to assess the total amount of damages—not just punitive.

For completeness, I address the arguments EverGlade raises against BDO's request for punitive damages. EverGlade argues that, by not stating the claim for punitive damages explicitly in its complaint, BDO has waived its claim and may not now amend its complaint to address the waiver.[80] EverGlade further argues that the statute of limitations has passed on any punitive damages claim anyway. BDO counters that its complaint implicitly preserves a claim for punitive damages by pleading malice and that it raised the issue at the first possible chance.[81]

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[79] *See Organovo Hldgs., Inc. v. Dimitrov*, 162 A.3d 102, 115–127 (Del. Ch. 2017) (Laster, V.C.) (assessing the jurisdictional issues that arise when courts of equity review defamation cases brought by plaintiffs seeking injunctive relief).

[80] *See* EverGlade's Opening Br. at 15–16.

[81] *See* BDO's Answering Br. at 19–22.

Delaware courts use a "notice pleading standard" that aims to put the defendant on "notice of the claim being brought against it and prevent unfair surprise."[82] Furthermore, parties are allowed to adapt their positions around changed circumstances over the course of a case. Partially for this reason, Superior Court Rule 15 "directs the liberal granting of amendments when justice so requires and, in the absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend."[83]

Starting with the complaint, BDO has well pled malice, as it argues, but that does not preserve an argument for punitive damages.[84] Malice describes the wrong; punitive damages is a remedy. To the extent BDO relies upon the face of the complaint for its punitive damages request, its argument fails.

That said, parties may adapt the relief they seek to the circumstances of the case. BDO initially sought injunctive relief in the Court of Chancery. After protracted stonewalling to avoid consequences for spoliation, EverGlade sought to transfer the case to the Superior Court, and I granted that request. One consequence of the transfer is that BDO may now seek punitive damages, even though it did not originally pursue that remedy in the Court of Chancery. BDO's position reflects adaption around both the motion

[82] *Meyers v. Intel Corp.*, 2015 WL 227824, at *4 (Del. Super. Jan. 15, 2005).

[83] *Cutting v. Live Nation Worldwide, Inc.*, 2023 WL 4363895, at *3 (Del. Super. July 3, 2023) (internal quotation marks omitted) (citing Super. Ct. R. 15).

[84] *See* Dkt. 1 (Compl.) ¶ 31.

practice and discovery misconduct of its opponent, rather than an attempt to unwittingly broadside the opposing party in a prejudicial manner.

What is more, BDO asserted its request for punitive damages as soon as practicable. I gave BDO leave to transfer the action from the Court of Chancery to the Superior Court on December 1, 2022.[85] Promptly, BDO so moved, and I entered the order transferring the case on Friday, December 2, 2022.[86] The following Monday, on December 5, 2022, BDO re-filed its complaint as a Superior Court action.[87] I issued the Memorandum Opinion on January 31, 2023, in which I entered a default judgment and asked the parties to provide an update on what the outstanding issues are. Two weeks later, on February 14, 2023, BDO filed a letter on behalf of the parties informing the court of the outstanding issues in dispute—including its request for punitive damages.[88] Under the circumstances, BDO preserved its punitive damages argument.

I briefly address EverGlade's statute of limitations argument. Even if the statute of limitations has run on BDO's punitive damages claim, the doctrine of equitable tolling applies. "Delaware courts, both federal and state, have recognized the concept of equitable tolling."[89] Equitable tolling may apply "where the defendant misled the plaintiff" or

[85] C.A. No. 2021-0244-KSJM, Dkt. 316.

[86] C.A. No. 2021-0244-KSJM, Dkt. 318.

[87] Dkt. 1.

[88] Dkt. 13.

[89] *Owens v. Carman Ford, Inc.*, 2013 WL 5496821, at *2 (Del. Super. Sept. 20, 2013).

"where the plaintiff was prevented from asserting his rights in some extraordinary way[.]"[90] As discussed in the Memorandum Opinion, it is apparent that EverGlade (i) prevented BDO from asserting its rights and (ii) misled BDO about the evidence regarding its defamation claim. And there is no prejudice to EverGlade under the circumstances. EverGlade's statute of limitations defense therefore fails.

In short, BDO has leave to amend its complaint to formally assert a punitive damages request. If it does so, the court will convene a jury trial. If BDO declines to do so, I will conduct a bench trial on BDO's damages claims. I will address any remaining outstanding issues depending on BDO's next step.

IT IS SO ORDERED.

Sincerely,

/s/ Kathaleen St. Jude McCormick

Kathaleen St. Jude McCormick

cc: All counsel of record (by *File & ServeXpress*)

[90] *Id.* at *3.